



# TEXAS OPTOMETRY BOARD

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RQ-396

May 14, 1992

RECEIVED

MAY 20 92

Opinion Committee

Honorable Dan Morales  
Attorney General of Texas  
P.O. Box 12548  
Austin, TX 78711-2548

RE: Request for Attorney General's  
Opinion as to Whether a Licensed  
Optometrist is a Retailer of  
Ophthalmic Goods for Purposes of  
Sections 5.11(a) and 5.11(b) of the  
Texas Optometry Act under the Facts  
Presented

Dear Attorney General Morales:

By this letter, the Texas Optometry Board (the "Board") requests the opinion of the Attorney General as to whether or not a licensed optometrist is a retailer of ophthalmic goods for purposes of Section 5.11(a) and (b) of the Texas Optometry Act (Article 4552 - 1.01, et seq., the "Act") under the facts presented.

## A. Applicable Facts

Dr. Smith (hypothetical name) is a licensed optometrist in the State of Texas. Dr. Smith and one other optometrist have formed a partnership (legal entity) for the practice of optometry and also for the sale and dispensing at retail of optometric goods at a given location in Texas. Dr. Smith and his partner are 100% owners of the office in which optometry is practiced and in which optometric goods are dispensed and sold at retail. The partnership practices under a trade name or assumed name.

Dr. Smith has similar partnerships for the practice of optometry and for the sale and dispensing at retail of ophthalmic goods at approximately fifteen (15) additional offices located throughout Texas. Each office practices under the same trade name or assumed name. With respect to each office, Dr. Smith has formed a partnership (legal entity) with one other different optometrist. In other words, Dr. Smith

Mr. Dan Morales  
May 14, 1992  
Page 2

has a partnership interest in approximately fifteen (15) offices in Texas where ophthalmic goods are sold at retail. In addition, Dr. Smith has three locations in Texas where optometry is practiced and ophthalmic goods are sold and dispensed at retail which are 100% owned and operated by Dr. Smith, individually. Dr. Smith also has an ownership interest in a chain of stores where optical goods are dispensed and sold at retail.

On the one hand, Dr. Smith, a licensed optometrist, has an ownership interest in more than three offices in Texas where ophthalmic goods are sold at retail. On the other hand, the same legal entity does not have offices at more than three (3) locations.

**B. Applicable Law**

Sections 5.11(a) and (b) of the Act prohibit any person who is a retailer of ophthalmic goods from, among other things, controlling or attempting to control the professional judgment, manner of practice or practice of an optometrist. Section 5.11(c) provides that it is the intent of the Legislature that the provisions of Section 5.11 shall be liberally construed to carry out this prohibition. Section 5.11(g) provides that Section 5.11 shall not apply where the retailer of ophthalmic goods is a licensed optometrist or legal entity one hundred percent owned and controlled by one or more licensed optometrists; however, the exception set forth in this subsection shall not apply where the optometrist or legal entity has offices at more than three locations.

**C. Question Presented**

Does Dr. Smith have offices at more than three (3) locations at which ophthalmic goods are sold at retail so that the exception under Section 5.11(g) is unavailable to Dr. Smith, thus making Dr. Smith a retailer of ophthalmic goods for purposes of Sections 5.11(a) and (b) of the Act?

Mr. Dan Morales  
May 14, 1992  
Page 3

To the extent it is pertinent, it is the position of the Board that the answer to the question posed is "yes". Section 5.11 declares that an optometrist who has offices in more than three (3) locations at which ophthalmic goods are sold at retail is deemed a retailer of ophthalmic goods for purposes of Section 5.11 of the Act. The Legislature further specifically expresses its intent in Section 5.11(c) of the Act that Section 5.11 is to be liberally construed so as to prevent a retailer of ophthalmic goods from controlling the manner of practice of another optometrist. A liberal construction avoids mere technical distinctions and gives the enactment the most comprehensive application of which it is susceptible without doing violence to any of its terms. If a retailer of ophthalmic goods (optometrist) who has offices at more than three (3) locations may avoid Section 5.11 by simply altering an employer/employee relationship with another optometrist at that location to a partnership relationship, then Section 5.11 could be rendered essentially meaningless.

For your further information the fact situation described is similar to a circumstance involving a licensed optometrist in Texas with whom the board has corresponded through counsel. As a courtesy, a copy of this request for an Attorney General's Opinion is being sent to provide an opportunity for that person to present additional arguments with respect to this point of statutory interpretation, if desired. The generic fact situation presented, however, is not unique to this particular optometrist.

D. Further Question Presented

If it is determined that Dr. Smith is a retailer of ophthalmic goods for purposes of Sections 5.11(a) and (b) under the facts described, may Dr. Smith nevertheless maintain an exception under Section 5.11(g) with respect to the three (3) offices wholly owned by him? To the extent it is pertinent, the position of the Board is that the answer to this question is "no". Once a person becomes a retailer of ophthalmic goods

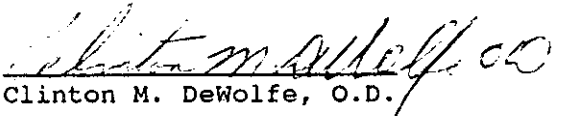
Mr. Dan Morales  
May 11, 1992  
Page 4

for purposes of Sections 5.11(a) and (b) of the Act, full compliance is required.

If you need any additional information, please do not hesitate to contact the undersigned.

Very truly yours,

TEXAS OPTOMETRY BOARD

By:   
Clinton M. DeWolfe, O.D.  
Chairman of the Board

CMD:cw

cc: Mrs. Lois Ewald, Executive Director  
Mr. Joe R. Greenhill, Jr., House Counsel  
Mr. Art Brender, Attorney